

1 UNITED STATES,)
2)

3 Plaintiff,)
4)

5 v.)

6 JAMES HUANG,)
7)

8 Defendant.)
9)

No. CR-06-00487 DLJ

ORDER

10 On November 2, 2007, the Court held an evidentiary hearing
11 regarding defendant's motion to suppress evidence. Thereafter, the
12 parties have submitted supplemental briefs and presented arguments
13 to the Court. George Bevan appeared on behalf of the government;
14 Douglas Horngrad appeared for defendant. Having considered the
15 arguments of counsel, the papers submitted, the applicable law, and
16 the record in this case, the Court hereby denies defendant's motion
17 to suppress evidence.

I. BACKGROUND

18
19 A. Factual Background and Procedural History

20 Defendants James Huang (Huang) and Lester Nhan (Nhan) are
21 charged with violating 21 U.S.C. § 846, conspiracy to manufacture and
22 to possess with intent to distribute marijuana, and 21 U.S.C. §
23 856(a)(1), use of a premises for purpose of manufacturing marijuana,
24 and aiding and abetting in the same in violation of 18 U.S.C. § 2.
25 The premises in question is located at 27468 Hayward Boulevard,
26 Hayward, California.
27

28 The residence at 27468 Hayward Boulevard was associated with a
series of 911 calls for the period April to July 2006 (April 22,

1 April 28, May 4, May 7, May 9, June 14, June 28, July 5, and July
2 8). The records for these calls indicate that for each call
3 originating from that address there was only static on the line.
4 Nonetheless, the Hayward Police were dispatched in response to each
5 call.
6

7 On May 9, 2006, after a 911 call was received, Hayward Police
8 Department Officers Esperson and Varela were dispatched to 27468
9 Hayward Boulevard. The officers arrived and knocked and banged on
10 the door. When no response was received the officers began walking
11 around the house in an effort to peer into the windows. The
12 officers could not see through any windows because the house sits on
13 a sloping hill. When the officers returned to the front of the
14 house the garage door opened. Defendant Huang was standing in the
15 garage.
16

17 The officers explained why they were there, and Huang told them
18 he had not called 911. According to the police report when
19 questioned as to whose residence it was, Huang was evasive - - first
20 saying that it belonged to a friend and then saying that it was his
21 residence. Esperson reports that Huang appeared nervous. The
22 officers entered the house to conduct a protective sweep of the
23 house and found that the house was almost empty, but nothing was
24 amiss.
25

26 On June 14, 2006, at 12:33 p.m., the Hayward Police Department
27 received a 911 disconnect call from (510) 881-0166. The police
28

1 dispatch log shows a 911 call with only static on the line
2 originating from the phone number assigned to 27468 Hayward
3 Boulevard. According to the government, because it was a busy day
4 Officers Esperson, Nguyen, and Tong were not dispatched to the
5 residence until 2:19 p.m. They arrived at 2:31 p.m. When they
6 arrived at the residence Officer Tong rang the doorbell to the
7 residence and defendant Huang answered the door.

9 Officer Esperson and Huang recognized one another from her
10 prior visit to the residence. Officer Tong explained that the
11 officers were responding to a 911 call. Huang told the officers he
12 did not call 911 and that the residence did not have a phone line.
13 Officer Tong reported that Huang appeared nervous when asked if
14 anyone else was in the house. Huang said two friends were with him.
15 Officer Tong asked where the friends were and Huang told him that
16 his friends were in the back of the house. Officers Tong and Nguyen
17 asked Huang for permission to enter the house to "make sure
18 everything was okay." Huang did not consent but asked whether the
19 police officers needed a search warrant.
20

21 The police officers told Huang that they would have to check to
22 see if there was anyone in need of police or medical assistance. At
23 this time defendant Nhan appeared in the foyer. Nhan was wearing
24 latex gloves. Nhan explained that he was installing flooring.

25 Inside the house officers saw marijuana being grown. Mr. Huang
26 and Mr. Nhan were then handcuffed. The residence was secured and a
27
28

1 search warrant was sought. In the later warrant request, the
2 officers stated that they entered the house to make a protective
3 sweep and that their basis for doing so included consideration of
4 Huang's nervous or suspicious behavior. After entering the house
5 the officers found an extensive marijuana grow. Huang and Nhan were
6 formally placed under arrest.
7

8 A search warrant was issued by Hayward Superior Court Judge
9 David Hunter at 7:35 p.m. The affidavit in support of the search
10 warrant was prepared by Officer Esperson. Officer Esperson's
11 affidavit included the basis for the alleged protective sweep and
12 what had been in plain view during the protective sweep.
13

14 Officer Tong reported that 27468 Hayward Boulevard did not
15 appear to be used as a residence. He stated that there were no
16 signs of toiletries, bedding, or personal effects. However,
17 photographs of 27468 Hayward Boulevard taken by law enforcement show
18 the presence of: cookware; packages of instant soup; juice; cleaning
19 supplies; tissues; a sofa bed, sheets for the sofa bed, a cable
20 television guide; backscratcher; toiletries; shampoo; facial
21 cleanser; a toothbrush and toothpaste; two drinking glasses labeled
22 "J" and "V"; a bath towel; and some clothing.
23

24 The vast majority of the house, as demonstrated by the photos,
25 was devoted to an extensive marijuana grow with plants in all of the
26 bedrooms as well as in the additional rooms other than the living
27 room and kitchen.
28

1 The Court held an evidentiary hearing on this matter on
2 November 2, 2007. At the evidentiary hearing the government
3 presented the testimony of Hayward Police Department Communications
4 Supervisor Desiderio Calzada. Calzada oversees the Dispatch Center,
5 radio communications, 911 calls, incoming communications and the
6 dispatching of officers in response to incoming calls. Calzada
7 testified that all 911 calls are assigned a "Priority Two". Calzada
8 testified that a "Priority Two" call is "a call that is urgent and
9 that we should try to get to as soon as possible." RT 30:2-4.
10 Calzada further testified that although there was no written
11 protocol regarding 911 calls, it was departmental practice to
12 "endeavor to try to check every" 911 call. In his testimony,
13 Calzada attributed the two hour time lag in responding to the June
14 14th call as a function of "resources and priorities" and that
15 officers were engaged attending to other incidents. RT 32:22-33:7.

16 Calzada testified that the 911 dispatchers did not communicate
17 to the responding officers that the call was a static call, or that
18 it came from a phone known to have ongoing problems. Dispatchers
19 did, however, make the responding officers aware of the time the
20 call had come in.
21

22 II. Legal Standard

23 A. Standing

24 A central principle of Fourth Amendment jurisprudence is that a
25 person may "retreat into his own home and there be free from
26
27
28

1 unreasonable government intrusion." Silverman v. United
2 States, 365 U.S. 505, 511 (1961). "The defendant has the burden of
3 establishing that, under the totality of the circumstances, the
4 search or seizure violated his legitimate expectation of privacy in
5 a particular place." United States v. Kovac, 795 F.2d 1509, 1510
6 (9th Cir. 1986).
7

8 Once he has done so, the burden shifts to the prosecution to
9 justify its failure to comply with the warrant requirement. See
10 e.g., United States v. Jeffers, 342 U.S. 48, 51 (1951); Stegald v.
11 United States, 451 U.S. 204, 212 (1981). Here, law enforcement
12 entered 27468 Hayward Boulevard without a warrant. Once defendant
13 has demonstrated standing, the entry must then be justified by the
14 prosecution.
15

16 B. Warrantless Entry

17 "There are two general exceptions to the warrant requirement
18 for home searches: exigency and emergency." United States v.
19 Martinez, 406 F.3d 1160, 1164 (9th Cir. 2005). "Under the exigency
20 doctrine, a warrantless search of a home is permitted if there is
21 probable cause to believe that contraband or evidence of a crime
22 will be found at the premises and that exigent circumstances exist."
23

24 The emergency exception involves entry into a residence "to
25 render emergency assistance to an injured occupant or to protect an
26 occupant from imminent injury." Brigham City, Utah v. Stuart, 126
27 S.Ct. 1943, 1947 (2006).
28

1 III. Argument

2 A. Does Huang Have Standing to Contest the Warrantless Entry?

3 There is no dispute that Huang did not own the Hayward
4 Boulevard house, or that it was his primary residence. Huang argues
5 that for standing purposes, he is "at least equivalent to an
6 overnight guest." Motion, p. 4. The government counters that there
7 is insufficient evidence that Huang stayed overnight at 27468
8 Hayward Boulevard and that there is evidence that he came only to
9 conduct criminal activities and so would lack standing.
10

11 While the government has adduced evidence that Huang's
12 residence was elsewhere, Huang argues that there is sufficient
13 evidence that he has stayed overnight on Hayward Boulevard,
14 including the two nights prior to his arrest. Huang argues that
15 these overnight stays are sufficient to raise a legally cognizable
16 privacy interest. Defendant has now submitted a declaration stating
17 that he has stayed overnight on Hayward Boulevard and also pointing
18 out the food, toiletries and other supplies which are indicia of his
19 overnight stays. As additional evidence to support his claim of
20 standing defendant points out that on May 9, 2006, Officer Esperson
21 concluded that Huang was the party responsible for the residence,
22 noting that he had keys to the house, and that on June 14, 2006,
23 when Huang answered the door he identified himself as a resident.
24

25 As legal support that these overnight stays are sufficient to
26 give him standing to contest the search, he cites to United States
27
28

1 v. Gamez-Orduno, 235 F.3d 453, 456 (9th Cir. 2000). In Gamez-Orduno
2 the defendants were transporting marijuana from Mexico via
3 horseback. Law enforcement tracked and found the defendants and the
4 marijuana in a trailer on a ranch. Id. The Court of Appeal held
5 that the defendants had standing to contest the trailer search
6 because they had been allowed to stay overnight in a trailer "for
7 food and rest." Id. at 461. The Court rejected the district
8 court's reasoning that a privacy interest does not exist unless the
9 overnight stay is for a social, as opposed to commercial, purpose.
10 Id. at 459-460. Moreover, the Court noted that the motive of the
11 host is not relevant to standing analysis. Id. at 460. In contrast
12 see Minnesota v. Carter, 525 U.S. 83 (1998) where defendants were
13 sitting in an apartment with the tenant of the apartment bagging
14 cocaine. Id. at 85-86. The Court held that there was no privacy
15 interest because the defendants were not akin to overnight guests
16 and were "essentially present for a business transaction and were
17 only in the home a matter of hours." Id. at 90.

18 Here, Huang is, for standing purposes, at least equivalent to
19 an overnight guest and so may contest the search.

20 B. Is the Entry Justified by Either the Exigency or
21 Emergency Exceptions to the Warrant Requirement.

22 The government bears the burden of proof of justifying the
23 warrantless search. Huang first argues that the government had no
24 reasonable basis for believing that the 911 call on June 14th in
25 fact originated from 27468 Hayward Boulevard. While the AT&T
26
27
28

1 telephone records for 27468 Hayward Boulevard and (510) 881-0166,
2 state that no records were found for them for the time frame
3 requested, the absence of records does not establish that there were
4 no 911 calls that day. Moreover, the police did not have access to
5 AT&T's records; they relied on the 911 dispatch. It was not
6 unreasonable for them to have done so especially in light of the
7 fact that the AT&T records comport with the 911 log for all prior
8 calls from that location.
9

10 The defendant next argues that the totality of the
11 circumstances viewed objectively does not justify a warrantless
12 entry. As noted above, the emergency exception involves entry into
13 a residence "to render emergency assistance to an injured occupant
14 or to protect an occupant from imminent injury." Brigham City, Utah
15 v. Stuart, 126 S.Ct. 1943, 1947 (2006).
16

17 In making the determination of an exception to the warrant
18 requirement, the Court looks primarily for guidance to the recent
19 Ninth Circuit decision in United States v. Snipe, No. 06-30215,
20 slip. Op. 1309 (9th Cir. Jan. 28, 2008). In Snipe, the Ninth
21 Circuit clarified the test for an exception to warrant requirement
22 based on exigent or emergency circumstances. The Snipe Court
23 affirmed its adoption of the two-prong test of Brigham City: (1)
24 considering the totality of the circumstances, law enforcement had
25 an objectively reasonable basis for concluding that there was an
26 immediate need to protect others or themselves from serious harm;
27
28

1 and (2) the search's scope and manner were reasonable to meet the
2 need. If law enforcement, while "respond[ing] to an emergency,
3 discovers evidence of illegal activity, that evidence is admissible
4 even if there was not probable cause to believe that such evidence
5 would be found." 219 F.3d at 888.

6
7 The Snipe Court noted in determining reasonableness the Supreme
8 Court has "consistently eschewed bright-line rules, instead
9 emphasizing the fact-specific nature of the reasonableness inquiry,"
10 and looked to the totality of the circumstances. Accord United
11 States v. Banks, 540 U.S. 31, 36 (2003) ("[W]e have treated
12 reasonableness as a function of the facts of cases so various that
13 no template is likely to produce sounder results than examining the
14 totality of circumstances in a given case; it is too hard to invent
15 categories without giving short shrift to details that turn out to
16 be important in a given instance, and without inflating marginal
17 ones.").

18
19 Huang in essence argues three reasons why the entry was not
20 reasonable under the circumstances. First, he asserts that the
21 police should not have taken the 911 call seriously because there
22 was a history of non-emergency calls to that Hayward address; (2)
23 that the circumstances at the house did not indicate an emergency;
24 and (3) that the police could not have considered the call an
25 emergency because it took them two hours to respond.

26
27 Defendant argues that based on the history of calls to Hayward
28

1 Boulevard location where nothing was found amiss the police could
2 not have believed that there was an emergency at that Hayward
3 location on June 14th. The state of the record before the Court,
4 however, indicates that dispatchers did not inform the responding
5 officers about the history of calls to that number. Since it is the
6 responding officers' reasonable belief which is being tested and not
7 that of the dispatchers, the Court finds that facts related to past
8 calls from that number are not relevant to the current
9 determination. Even if the past history of calls were
10 determinative, the Snipe Court makes it clear that the police do not
11 have an obligation to research call histories before responding to a
12 911 type call.
13

14 Snipe argued that the police should have done something to
15 verify the caller's identity or the facts at Snipe's home before
16 entering the Snipe residence because of the possibility of prank
17 calls. The Snipe Court noted that:
18

19 We have previously rejected such a requirement on the
20 grounds that it "would dramatically slow emergency
21 response time, and would therefore be at odds with the
22 purpose of the emergency doctrine-allow[ing] police to
23 respond to emergency situations" in a timely manner.
24 United States v. Russell, 436 F.3d 1086, 1092 (9th
25 Cir.2006). Indeed, in situations like the present, where
26 the dispatcher is prevented from verifying the caller's
27 identity because the number that the caller called in on
28 does not populate, indicating either it was a blocked
number or a cell number, Snipe's rule might prevent the
police from responding at all. We appreciate the risk of a
"false positive" emergency call and recognize that a show
of police force in response to a prank call is a
substantial intrusion on the lives of the prank's victims.
It is the nature of our own assessments of what

1 constitutes an emergency that the police will routinely be
2 summoned for matters that are not, in some objective
3 sense, real emergencies. We will not impose a duty of
4 inquiry on the police to separate a true cry for help from
5 a less deserving call for attention because the delay may
6 cost lives that could have been saved by an immediate
7 police response. The possibility that immediate police
8 action will prevent injury or death outweighs the
9 inconvenience we suffer when the police interrupt our
10 ordinary routines in response to what turns out to be a
11 non-emergency call."

12 This language also vitiates defendant's second argument, that
13 the circumstances at the house did not rise to the level of an
14 emergency. As the Snipe Court notes, once the police have been
15 summoned via a 911 call, it is incumbent on them to assure that
16 their assistance is not truly needed. The testimony at the
17 evidentiary hearing was that the Hayward Police have a practice of
18 responding to all 911 calls, and the facts of this case bear that
19 out. While there were numerous 911 calls from the number associated
20 with the Hayward residence, the Hayward police responded to each and
21 every one, and most of the calls were responded to quickly.

22 In arguing that the circumstances at the house did not
23 demonstrate an emergency justifying entry, defendant attempts to
24 distinguish his case from Snipe. In Snipe, the officers knew that
25 they were responding to an emergency call by "a hysterical male."
26 While there was no such person in the case at bar, the responding
27 officers testified at the grand jury that Huang was evasive and
28 nervous when law enforcement responded to 27478 Hayward Boulevard
both on May 9th and again on June 14, 2006. While Huang was talking

1 to the officers at the front door, he glanced back and forth at each
2 of the officers as he spoke, and appeared to become increasingly
3 nervous with the officers' presence. Huang shifted his weight from
4 foot to foot and began breathing heavier. The police testified that
5 Huang's nervousness combined with his representation on June 14th
6 that two friends were inside the house supported the reasonable
7 inference that those persons could be in danger or needing immediate
8 police assistance.
9

10 The Ninth Circuit in Snipe specifically rejected the argument
11 that the police must witness ongoing violence before responding to
12 an emergency. The Ninth Circuit noted that such a requirement would
13 conflict "not only with the purposes underlying the emergency
14 doctrine but also with Brigham City's express statement that police
15 officers do not have to wait for violence before acting. 126 S.Ct.
16 at 1949 ("The role of a peace officer includes preventing violence
17 and restoring order, not simply rendering first aid to
18 casualties."); see also United States v. Brown, 64 F.3d 1083, 1086
19 (7th Cir.1995) (police do not need to stand outside an apartment
20 unless they can hear screams).
21
22

23 Nor does the Court find defendant's argument about delay
24 vitiating emergency circumstances dispositive. The Court concedes
25 that the facts of some of the cases which have allowed an emergency
26 exception to the warrant requirement despite a delay are more
27 compelling than those which face the Court currently. See U.S. v.
28

1 Wiggins, 2002 WL 482334 (E.D.Va.,2002)(anonymous 911 call reporting
2 that someone shot combined with defendant's suspicious demeanor);
3 U.S. v. Boettger, 71 F.3d 1410 (8th Cir.,1995)(explosive chemicals
4 and destructive devices found in defendant's apartment following
5 explosion justified a warrantless search of defendant's apartment
6 two days after explosion); U.S. v. Lindsey, 877 F.2d 777 (9th Cir.
7 1989) (after a drug informant's arrest, requested backup officers
8 delayed); U. S. v. Jones, 635 F.2d 1357 (8th Cir. 1980)(delay of one
9 hour reasonable based on reported shots and burning smell); Foutz
10 v. City of West Valley City, 2004 WL 2700012 (D.Utah 2004)
11 (warrantless entry reasonable belief based on statements from
12 neighbors that they heard sounds of struggle and woman's scream);
13 U.S. v. De Jesus-Batres, 410 F.3d 154 (5th Cir. 2005)(finding that
14 additional aliens in garage could have been injured or sick and any
15 additional suspects could have posed a safety risk to the officers.)

16
17
18 However, in assessing the reasonableness of the officer's
19 belief that the call should be treated as an emergency, the
20 testimony at the evidentiary hearing was that this call, like all
21 911 calls, was given a Priority Two designation. The record
22 indicates that almost all of the other 911 calls from the Hayward
23 Blvd. address were responded to within minutes. This evidence
24 demonstrates that the Hayward Police took these calls seriously and
25 responded promptly. Supervisor Calzado testified that the day in
26 question was a very busy day and that officers were dispatched as
27
28

1 they became available. The Hayward Police's history of quick
2 responses to the 911 static calls at the Hayward address both before
3 and after the date in question supports the assertion that resources
4 were not in fact available to respond more quickly on June 14th.
5 Defendant argues that other officers were available to send, but
6 such is not the state of the undisputed record before this Court.
7 While there may have been some other officers "coming and going"
8 from the station during the time in question, the Court has no
9 admissible evidence in front of it as to the circumstances
10 surrounding these officers' availability. The Court finds based on
11 all of the above, that under the totality of the circumstances, the
12 officers entry into the Hayward Boulevard address meets the first
13 prong of Snipe.
14


15
16 The second prong of the exigent circumstances test considers
17 whether the manner and scope of the officers' entry was reasonable.
18 Defendant does not contest the scope of the entry and in any event,
19 the Court finds that the entry was reasonable.
20

21 III. Conclusion

22 For all of the reasons stated above, the Court finds that the
23 two-prong test set out in Snipe is met. Therefore the Motion to
24 Suppress is DENIED.

25 IT IS SO ORDERED

26 Dated: February 8, 2008



D. Lowell Jensen
United States District Judge